

Should the EU Care About the Rule of Law at Member State Level?

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Notwithstanding the multiple Treaty provisions making clear that EU Member States ought to respect and promote the rule of law, multiple normative and practical reasons may also be put forward to justify a significant role for the EU in this area. To name but a few (see [this chapter](#) by Professor Closa for more details): serious and sustained rule of law shortcomings in any Member State do not simply affect the citizens of the relevant Member State, they also affect other EU citizens through that country's participation in the EU's decision-making process and the adoption of norms that bind all in the EU. In addition, the interdependence of judiciaries across the EU counsels EU-level concern (see in this respect the recent and important judgment of the Court of Justice in *Associação Sindical dos Juizes Portugueses* analysed [here](#)).

First, on decision-making: If EU Member States' national governments are no longer committed to the rule of law, those states still have a vote in the Council on matters of importance to the EU unless these states are sanctioned. Perhaps this is why one of the most important sanctions under Article 7(2) and (3) TEU involves removing a Member State's vote in the Council. Decision-making – including law-making – that is done in the name of the EU can be contaminated for all states if those states that seek to undermine EU principles are permitted to vote on official EU matters.

Then, on EU law enforcement: The EU is based on the principles of mutual trust and mutual recognition of judicial decisions, which means that court decisions made in any EU Member State must be enforced by all of the others. Because there is no appeal from the highest courts of EU Member States to the European courts when the Member State court fails to apply EU law correctly, this can mean that politically motivated deviations from EU law can easily become the law in practice within a Member State as applied to the citizens of that Member State or to others, including nationals of other EU Member States. One can see the problem particularly sharply with regard to the recognition of requests for extradition under the European Arrest Warrant. Rule-of-law-abiding Member States would be required by EU law to send anyone on their territory (including their own nationals) to a non-rule-of-law abiding Member State upon request. Moreover, EU citizens who have the right of free movement within the EU may find themselves under the jurisdiction of any of the legal systems that operate within the EU and would therefore be subject to being judged by courts that have come under the political tutelage of a non-rule-of-law government. Excluding a particular Member State's courts from the presumption of mutual trust means cutting a hole in the very fabric of the EU.

The core EU law principle of mutual trust cannot survive when one national system ceases to be governed by the rule of law. The legal systems within the European Union are fully interdependent so that a problem in one soon becomes a problem for all. And that is before

one considers that the legitimacy and credibility of the EU are also undermined when it ceases to be able to guarantee internal compliance with the values it is legally bound to uphold and promote in its external relations.

The Commission therefore had a point when it noted in 2014 that “the confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU as “an area of freedom, security and justice without internal frontiers”.” One may similarly agree with Frans Timmermans when he explained last December why the EU could not leave unanswered the Polish ruling party’s sustained and systemic attacks on the rule of law:

The Rule of Law is a necessary condition for effective cooperation between Member States. This is not just about the situation in Poland, this about the EU as a whole, about who we are. An issue with the rule of law in one Member State is of concern to all Member States ... It is my firm belief that redressing the rule of law is in the interest of Poland as a nation ... And it is certainly in the interest of the EU as a whole.

Because threats to the rule of law in one EU country threatens the functioning of the Union as a whole, EU institutions ought to prevent and eventually sanction what we have called rule of law backsliding.

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